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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/525,913	09/08/2005	Maria Francisca Holtus	0470-050645	1024
28289 7590 06/12/2009 THE WEBB LAW FIRM, P.C. 700 KOPPERS BUILDING 436 SEVENTH AVENUE PITTSBURGH, PA 15219				
EXAMINER				
BEKKER, KELLY JO				
ART UNIT		PAPER NUMBER		
1794				
MAIL DATE		DELIVERY MODE		
06/12/2009		PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/525,913

Applicant(s)

HOLTUS ET AL.

Examiner

Kelly Bekker

Art Unit

1794

Period for Reply -- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 02 March 2009.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 24-51 is/are pending in the application.
- 4a) Of the above claim(s) 49 and 50 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 24-48 and 51 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-8508)
- 4) ☐ Interview Summary (PTO-413)
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____
- Paper No(s)/Mail Date _____

DETAILED ACTION

Applicant's amendments made March 2, 2009 have been entered.

Claims 24-51 remain pending.

Claims 49 and 50 have been withdrawn from consideration.

Oath/Declaration

The oath or declaration is compliant. The previous objection to the oath or declaration has been withdrawn.

Claim Rejections - 35 USC § 112

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

The 112 2nd paragraph rejection of claims 38-40 and 42 due to the term "minor amount" has been withdrawn in light of applicant's amendments filed March 2, 2009.

Claim Rejections - 35 USC § 102

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 24-35, 38-43, 45, 46, and 51 are rejected under 35 U.S.C. 102(b) as being anticipated by Chmiel et al. (US 2002/0018839 A1). The references and rejection are incorporated herein and as cited in the office action mailed October 28, 2008. Regarding the newly added limitation, Chmiel teaches of entrapping gas into the foaming ingredient at a pressure of about 100-400kPa (paragraph 0029).

Claim Rejections - 35 USC § 103

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 36 and 37 are rejected under 35 U.S.C. 103(a) as being unpatentable over Chmiel et al. (US 2002/0018839 A1) in view of Ginnette et al (US 2981629). The references and rejection are incorporated herein and as cited in the office action mailed October 28, 2008.

Claims 44 and 47 are rejected under 35 U.S.C. 103(a) as being unpatentable over Chmiel et al. (US 2002/0018839 A1) in view of Scinto (EP 0813815 A1). The references and rejection are incorporated herein and as cited in the office action mailed October 28, 2008.

Claims 44, 47, and 48 are rejected under 35 U.S.C. 103(a) as being unpatentable over Chmiel et al. (US 2002/0018839 A1) in view of Bisperink et al. (EP 1074181 A1). The references and rejection are incorporated herein and as cited in the office action mailed October 28, 2008.

Response to Arguments

Applicant's arguments filed March 2, 2009 have been fully considered but they are not persuasive.

Applicant argues that the references of record do not teach of entrapping gas into the foaming ingredient within the range of about 100kPa to about 20MPa. Applicant's argument is not convincing as Chmiel teaches of entrapping gas into the foaming ingredient at a pressure of about 100-400kPa (paragraph 0029).

Applicant argues that the references of record do not teach high concentrations of proteins and optionally plasticizers in a foaming ingredient. Applicant's argument is not convincing as Chmiel teaches, paragraphs 0018 and 0019, that the creamer powder comprises about 0.05-0.5% coffee aroma components, about 0.01-0.1% soluble coffee solids, wherein "the remaining components include *one* or more proteins, fats, and carbohydrates", thus Chmiel teaches that the creamer contains 99.04-99.4% proteins or consists essentially of proteins and contains no added carbohydrates; and as Chmiel teaches that the foaming ingredient optionally contains 0% or more of additional ingredients including monoglycerides (paragraphs 0023-0025) which applicant admits are plasticizers (Specification page 2 line 31 through page 3 line 5).

Applicant argues that the instantly claimed product is different from that as the product of the prior art references because it is produced in a different manner. Applicant's argument is not convincing because the claim is a product claim and as a recitation of the method of making the claimed invention must result in a structural

difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. As stated in the previous office action, one of ordinary skill in the art at the time the invention was made would expect a foamer ingredient formed by spray drying to obtain a powder, subjecting the powder to gas under pressure at an elevated temperature so that the existing powder particles take up the gas, and then cooling the powder to cure and releasing the pressure, as instantly claimed, to be structurally the same as a foaming ingredient formed by injecting gas under pressure into a homogenized solution and then spray drying the solution as taught by Chmiel (paragraphs 0028-0031), as both methods produce a spray dried powder with a gas filled void. Thus, the claimed invention is anticipated by the reference absent any clear and convincing evidence and/or arguments to the contrary. At the present time applicant has argued that the products are different but has provided no reasoning or evidence in support of the argument.

In response to applicant's argument that Ginnette is nonanalogous art, it has been held that a prior art reference must either be in the field of applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the applicant was concerned, in order to be relied upon as a basis for rejection of the claimed invention. See *In re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992). In this case, the prior art reference is in the field of applicant's endeavor; Ginnette is directed towards dried foaming ingredients as is the instantly claimed invention.

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of

the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kelly Bekker whose telephone number is (571) 272-2739. The examiner can normally be reached on Monday through Friday 8am-4:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Lien Tran/
Primary Examiner
Art Unit 1794

/Kelly Bekker/
Examiner
Art Unit 1794